Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

IN THE MATTER OF THE PATERNITY
OF "ADAM," A Minor Child

"BOB,"
Petitioner,

and

"MARY" and "JOHN,"
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

PETITION FOR A WRIT OF CERTIORARI

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Date: January 16, 1996

68 pp

QUESTIONS PRESENTED FOR REVIEW

Are the constitutional guarantees of equal protection and due process violated in a paternity action where the admitted biological father is denied the status of a presumed father and the court determines paternity on a "best interests of the child" standard based on the mother's post-conception marriage to another man where the biological father has promptly instituted the action sixteen days after the birth of the child and had previously exhausted statutory remedies available prior to the birth of the child by filing with the appropriate court a "Notice of Intent to Claim Paternity" and had refused to relinquish his parental rights when he was requested to do so by the mother prior to the birth of the child?

LIST OF PARTIES TO THE PROCEEDING

The caption of the case contains all of the names of the parties. The Montana Supreme Court assigned pseudonyms in place of the parties actual names.*

*The Constitutionality of statutes of the State of Montana may be drawn into question, neither the State of Montana nor any agency, officer employee thereof is a party to this action. Petitioner notes that 28 U.S.C. §2403(b) may apply and that the Attorney General of the State of Montana has been served.

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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1995

No._____

IN THE MATTER OF THE PATERNITY
OF "ADAM," A Minor Child

"BOB,"

Petitioner and Appellant,

and

"MARY" and "JOHN,"

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

---

PETITION FOR A WRIT OF CERTIORARI

"BOB" petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Montana in this case based upon conflicts with the relevant decisions of the United States Supreme Court.

OPINIONS BELOW

1. The decision of the Supreme Court of the State of Montana is reported at Mont. , 903 P.2d 207, 52 St. Rep. 1026, and is reproduced herein as Appendix A at 1a-11a.

2. The Findings of Fact, Conclusions of Law and Order of the Montana Eighteenth Judicial District Court, Gallatin County, which were affirmed by the Supreme Court of the State of Montana, are not reported; they are reproduced herein as Appendix B at 13a-27a.

JURISDICTION

The decision of the Montana Supreme Court, the Court of last resort in the State of Montana, was entered on September 29, 1995 and Petitioner's timely request for rehearing was denied on October 19, 1995. Appendix D at p. 28 a. Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1257.

STATUTES INVOLVED

This case involves the interpretation of the Montana Uniform Parentage Act and the consideration of the constitutional rights of Petitioner in a paternity declaration as they exist under the Fourteenth Amendment, Due Process Clause and Equal Protection Clause of the United States Constitution and under the Due Process Clause and Equal Protection Clause of the Montana Constitution, Art. II. § 17, and Art. II. § 4. The constitutional provisions and pertinent provisions of the Montana Uniform Parentage Act are set forth in Appendix E at a .

STATEMENT OF THE CASE

A Factual Background

This case is an action brought by Bob, an unwed father,

for the determination of paternity of a child who was consensually conceived by Mary and Bob. Mary and Bob were both unmarried at the time they conceived the child who is the subject of this action.

The distinctive facts of this case of first impression are Mary's and John's *post-conception* marriage which occurred with knowledge that Bob was the father of the unborn child and with knowledge that Bob was not going to relinquish his parental rights. See §40-6-135. Bob has exhausted all avenues available in order to establish his parental role with the child, John and Mary's defense of this action has prevented him from engaging in any parental role.

B. The Court of First Instance

The *post-conception* marriage as addressed by the court of first instance was the basis of determining that under the Montana statutory scheme John was Adam's "presumed legal father." The presumption is set forth in a statutory evidence provision at §26-602(31) and in the Uniform Parentage Act at §40-6-105. The court determined that the issue before the court was "whether it was in the best interests of the minor child, [Adam]., to determine paternity in [Bob] when [Adam] has a presumed father in Respondent [John]." The lower court went on to state that to resolve this issue: "[T]he court must weigh conflicting presumptions of paternity and legitimacy." The presumption of legitimacy is set for at §40-6-201.

The court of first instance noted that under § 40-6-105(2). MCA, "[a] presumption of paternity may be rebutted in an appropriate action by a preponderance of the evidence." The lower court did not specifically state that the presumption was rebutted and avoided the issue by applying a best interests standard to the question which was resolved in favor of Mary and John. The Court's determination effectively treated the unwed admitted biological father differently than

John because of John's post-conception marriage to Mary. The lower court failed correctly to address the statutory provision which states that the parent child relationship is not dependent on marriage as set forth at §40-6-103. The lower court dismissed Bob's petition and granted Bob no relief.

A presumed legal father has a preferred legal status accorded different treatment by virtue of the fact that a presumed legal father's parental rights could not be terminated without a showing that the presumed legal father was unfit according to existing Montana statute and case law. The court of first instance applied the presumption of paternity in John despite recognition in the specific findings that Bob had 1) filed a Notice of Intent to Claim Paternity pursuant to § 40-6-126, MCA, prior to the birth of the child; 2) Bob "promptly began paternity proceedings and should not be punished for complying with legal procedure; and 3) that the lack of contact between the two (Bob and Adam) is in no small measure due to the length of these proceedings; and 4) that Mary and John had filed a "confidential stipulation" with the Court that Bob was the biological father of Adam.

C. Raising the Federal Question

The court of first instance correctly concluded that "[a] presumption of paternity "may be rebutted in an appropriate action by a preponderance of the evidence" but did not determine that this action was an appropriate action. In its Findings of Fact, Conclusions of Law and Order following trial the lower court framed the issues as "a judge trial on the issues of paternity, whether it is in the child's best interest to declare paternity, and whether the identity of the biological father should remain confidential." Appendix C at 15a, finding 9.

The court of first instance framed the issues decided to include the issue of whether the identity of the biological father should remain confidential which was raised in prior

briefing of motions, but the court of first instance excluded consideration of the due process clause and equal protection clause issues raised in the briefing of the same matter.

The issues of due process and equal protection were raised and brought before the court of first instance in the Combined Reply to Respondents' Brief Opposing Petitioner's Motion of Summary Judgment, and Response to Respondent's Cross Motion to Dismiss or to Determine the Best Interests of T.C.D., A Minor Child, which was filed on October 20, 1993. At pages 24 through 28 of that pleading the issues of due process and equal protection were raised directly:

> Respondent's argue in their Brief that Petitioner has no constitutional right to a declaration of paternity in this action on the basis of *Michael H. v. Gerald D.* 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91(1989) However, *Michael H.* does not preclude the existence of a constitutional right in Petitioner to maintain a relationship with T.C.
>
> As discussed in part I. above, *Michael H.* addressed the California paternity statute, which limited standing to challenge the presumption of legitimacy to a husband and wife. The plurality in *Michael H.* upheld the California paternity statute based upon a finding that the statute was an express declaration of social policy by the California Legislature to protect the integrity of the family by refusing to allow the presumption of paternity to be rebutted. The Court stated that it was not unconstitutional for the State to give categorical preference to this interest over the liberty interest asserted by the putative father.
>
> However, only Justice Rehnquist joined in that part of Justice Scalia's opinion which denied that the putative father possessed a fundamental right to a relationship

with his child. Justice O'Connor filed a concurring opinion in which Justice Kennedy joined, in which Justice O'Connor disagreed with the level of specificity of Justice Scalia's historical analysis of the interest asserted by Michael H. Justice O'Connor also stated that she would not preclude the unanticipated by the prior imposition of a single mode of historical analysis. She therefore did not deny the existence of a liberty interest in Michael H.

Justice Stevens also filed a concurring opinion in which he stated that he would not foreclose the possibility that a natural father has a constitutionally protected interest in a relationship with his child in a case like that.

Therefore, the Court in *Michael H.* did not preclude the existence of a constitutional right of a natural father to a relationship with his child born into the marriage of the mother to another man.

In *Lehr v. Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) the Supreme Court held:

> When an unwed father demonstrated a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child, (citations omitted), his interest in personal contact with his child acquires substantial protection under the Due Process Clause.
>
> * * *
>
> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent child

> relationship and make uniquely valuable contributions to the child's development.

77 L.Ed.2d at 626, 627.

In *Rivera v. Minnich*, 483 U.S. 574, 107 S.Ct. 3001, 97 L.Ed.2d 473 (1987), the Court restated the fundamental right involved:

> In *Santosky*, we described the parent's desire for, and right to, the companionship, care, and custody of his or her children as "an interest far more precious than any property right." (citations omitted)

97 L.Ed.2d at 480.

Moreover, in *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990), the Court stated:

> The fact of biological parentage generally offers a person only "an opportunity . . . to develop a relationship with his offspring." (citations omitted) But the demonstration of commitment to the child through the assumption of personal, financial or custodial responsibility may give the natural parent a stake in the relationship with the child raising to a liberty interest.

111 L.Ed.2d at 367.

The U.S. Supreme Court has clearly recognized the fundamental right of a natural parent to a relationship with his child when the parent comes forward to accept responsibility of the child, or in fact establishes a relationship with a child. In this case, the Petitioner has

at all times not only accepted responsibility for the future of T.C., he has sought it. That he has been prevented from establishing a relationship with T.C. as a result of the Respondents' actions does not preclude the existence of this fundamental liberty interest.

In addition, the Montana legislature has not expressed a policy of preserving the family unit at the cost of the fundamental right of a natural parent to establish a relationship with his child as did the California legislature in *Michael H.* Therefore, under *Lehr,* Petitioner has a fundamental right to a determination of paternity in this matter, which cannot be proscribed without due process of law.

The Court in *Lehr* also stated implicitly that a natural parent who comes forward to accept responsibility for his child's future, is entitled to protection under the Equal Protection Clause of the U.S. Constitution. 77 L.Ed.2d at 630, 631.

In sum, Petitioner does have constitutionally recognized rights to seek a paternity declaration in this matter, which may be balanced against constitutionally protected interest in the integrity of the family raised by Respondents. In this case, Petitioner's right to a relationship with T.C. outweighs the interest of the Respondents in the presumption of legitimacy because the marriage entered by Respondents is not a stable enduring unit. Moreover, Petitioner's liberty interest arose before Respondents entered into the marriage, and they entered the marriage with full knowledge of Petitioner's claims of paternity.

The constitutional rights of Petitioner in a paternity declaration exist not only under the U.S. Constitution, but also under the Due Process Clause and Equal

Protection Clause of the Montana Constitution, Art. II, §17, and Art. II, §4.

IV. PETITIONER'S IDENTITY SHOULD NOT BE KEPT CONFIDENTIAL, AND HIS PARENTAL RIGHTS CANNOT BE TERMINATED APART FROM AN EXAMINATION OF THOSE RIGHTS IN LIGHT OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE U.S. CONSTITUTION AND THE MONTANA CONSTITUTION.

At this point in the proceeding, prior to the informal hearing under, Section 40-6-114, M.C.A. and in light of the above arguments supporting Petitioner's cause of action for a declaration of paternity, an order that Petitioner's identity be kept confidential is not merited.

In addition, as state by the California supreme court in Adoption of Kelsey S., ____Ca.3d ____, ____ Cal.Rptr. ____, 823 P.2d. 1216 (1992), to the extent that a statute allows a mother unilaterally to preclude her child's biological father from becoming the presumed father and thereby allowing the state to terminate his parental rights on nothing more that a showing of the child's best interest, it is violative of the federal constitutional guarantees of equal protection and due process for unwed fathers.

D. Appeal to the Montana Supreme Court

The issues of equal protection and due process were again raised by appeal to the Montana Supreme Court. The Montana Supreme Court declined to fully consider the constitutional issues determining that those issues were not raised below. The Montana Supreme Court's determination is contrary to the record. The issues were raised, the court of first instance did not rule on those issues but did rule on

other issues raised in the same briefing. All of the parties were heard on the issue in the briefing of the parties. Although the Montana Court determined the issues were not raised below, the arguments are set forth in the briefing of the parties.

The Montana Supreme Court's determination that the issue was not raised below is not supported by the record. If the matter were not properly raised below, according to the Montana Supreme Court's prior holdings the fundamental rights of the parties involved here are within exceptions explicitly embraced in prior Montana opinions. The Montana Supreme Court has previously stated that:

> Ordinarily errors not raised below will not be considered on appeal, however this rule is subject to the exception that when the question is raised for the first time on appeal it relates to the fundamental rights of the parties. As noted by the Washington Supreme Court in the case of *Maynard Investment Co. v. McCann,* 77 Wash.2d 616, 465 P.2d 657, 661: "The exception to the rule is a salutary one. Courts are created to ascertain the facts in a controversy and to determine the rights of parties according to justice. Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent.

Halldorson v. Halldorson, 175 Mont. 170, 173-4, 573 P.2d 169, 171 (1977)

REASONS FOR GRANTING THE WRIT

This case presents important federal questions regarding the scope of the constitutional protections of the interest that an unwed natural parent has in his or her child. The issues presented below have been addressed in multiple opinions

of the United States Supreme Court. The state court has decided the federal questions of due process and equal protection rights of an unwed father in a manner that ignores the relevant decisions of the United States Supreme Court, in that it has denied the Petitioner herein due process and equal protection. The Montana Supreme Court affirmed the lower court's analysis which failed to consider the relevant decisions of the United States Supreme Court and adopted the "best interest of the child" standard for deciding whether there should be a judicial determination of the father/child relationship in this action.

The issues presented in this case are very similar to the issues decided in *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985 (1983). This case presents an opportunity for the Court to define the scope of such constitutional protections and to define the requirements to be satisfied in regards to the equal protection analysis. This case is an opportunity to synthesize the prior holdings of the Court.

The fundamental interest at stake in this matter requires that the Court examine the suspect classification of "presumed father" status granted to John based on his post conception marriage to Mary. This matter is a question of federal due process and equal protection. Whether Bob's interest is entitled to constitutional protection requires only a determination that the fact of paternity exists. In order to satisfy the standards of judicial review in this case the "compelling state interest" must be identified as the sanctioning of the protection of the post-conception legitimization of a child. There can be no "compelling state interest" that can reasonably be maintained here.

The court of first instance should have recognized the fundamental right of Bob and properly found that the

presumption of paternity was rebutted and that Bob was entitled to a determination of unfitness prior to the termination of his parental rights. Regardless of how the Montana Supreme Court phrased the determination of the issue, the actions of the Montana courts did terminate any possibility that Bob as the acknowledged/stipulated biological father could have a parental role in his child's life.

The Supreme Court addressed unwed fathers rights previously in *Quilloin v. Walcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978). A unanimous court in *Quilloin,* 434 U.S. 246, 98 S.Ct.. 549, 54 L.Ed.2d 511, stated that "[The relationship between parent and child is constitutionally protected." (Id., at p. 255, 98 S.. at 554.) The U.S. Supreme Court under the facts of *Quilloin* found no denial of either due process or equal protection in particular circumstances of that case. In addressing due process, the U.S. Supreme Court explained:

> "We have little doubt that the Due Process Clause would be offended '[if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, *without some showing of unfitness* and for the sole reason that to do so was thought to be in the children's best interest.' [Citation.] But this is not a case in which the unwed father at any time had, *or sought,* actual or legal custody of his child. . . . Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.'" (Ibid., italics added.)
>
> *Quilloin, supra,* 434 U.S. at p. 256, 98 S.Ct at p. 555.

This matter is clearly distinguishable from *Quilloin.* The matter before the court of first instance and the Montana Supreme Court was obviously not a case where the father

had sat on his rights and had failed to take steps to establish his paternity and his role as a parent.

The *Quillon* court also restricted its holding as to equal protection. The father contended he should have the benefit of the same standard applied to married fathers. In rejecting this claim, the court explained, "[H]e has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and indeed, he does not even now seek custody of his child." *Quilloin*, 434 U.S. at p. 256, 98 S.Ct at p. 555. Bob's case has what the court found lacking in *Quilloin*, and what the court suggested might render invalid a termination of a father's rights based only on a showing of the child's best interest. Bob refused to relinquish his parental rights to the child, sought to claim paternity of the child prior to the birth of the child, and instituted a Petition to Determine Paternity, Custody and Visitation. Bob continues to seek legal recognition of his parental rights.

Quilloin strongly suggests that the parental rights of a father in Bob's position may not properly be terminated absent showing of his unfitness as a father. The question of the legitimization of the child by the marriage of Mary and John should be given little or no consideration as bearing on Bob's constitutional rights to due process and equal protection. Mary and John can not be permitted to reasonably argue that their marriage with knowledge of Bob's refusal to relinquish his parental rights should accord them additional protections to the exclusion of Bob's rights. Bob's rights matured and were subject to protection prior to the marriage of Mary and John. Bob's due process and equal protection rights as an unwed father should not be divested from him on the basis of Mary's unilateral actions.

Regardless of whether Mary and John have a wonderful marriage, have been successful in business and have acquired a home complete with a white picket fence and a swing in the backyard, Bob is the biological father and has a fundamental interest that should be accorded due constitutional protections as have been enunciated by the United States Supreme Court in its decisions. "Courts are not free to take children from parents simply by deciding another home appears more advantageous." *DeBoer v. DeBoer,* 509 U.S. ____, ____, 114 S.Ct. 1, 2, 125 L.Ed.2d 755, 757(1993).

In the so-called 'Baby Richard" case, *O'Connell v. Kirchner,* ____ U.S. ____, 115 S.Ct 1820, 130 L.Ed.2d 1054 (1995), the U.S. Supreme Court affirmed the Illinois Supreme Court in denying cert. The state supreme court recognized the biological father over the adoptive father, the lower court had stated:

> These laws are designed to protect natural parents in their preemptive rights to their children wholly apart from any consideration of the so-called best interests of the child. If it were otherwise, few parents would be secure in the custody of their own children. If best interests of the child were a sufficient qualification to determine child custody, anyone with superior income, intelligence, education, etc., might challenge and deprive parents of their right to their own children. 638N.W.2d 181-183.

In both the *Kirchner and DeBoer* cases, the natural father appeared late in the case, and uprooted well established and bonded relationships. In the present case, "Bob" asserted his intent to claim paternity even before "Adam" was born. The mother's stipulation that Bob was the natural father should have ended the question.

In *Caban v. Mohammed* (1978) 441 U.S.. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 *(Caban),* the court's equal protection discussion began with the rule that "Gender-based [i.e., sex-based] distinctions must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause." (Ibid.) The court explained that not all distinctions would be invalid. "In those cases where the father *never has come forward* to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the state from withholding from him the privilege of vetoing the adoption of that child." (Id., at p. 392, 99 S.Ct. at p. 1768, italics added.) Bob has come forward and thus appears to be entitled to some protection under *Caban.*

In *Lehr v. Robertson* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed2d 614 (1983) the court's holding was that the equal protection clause does not prevent a state from according a child's biological father fewer rights than the mother if he has "never established a relationship" with the child. (Id., at pp. 267-268, 103 S.Ct. at pp. 2996-2997.) The court did not purport to decide the question of whether the mother may constitutionally prevent the father from establishing the relationship that gives rise to his right to equal protection.

The *Lehr* court, however, recognized the uniqueness of the biological connection between parent and child. "The significance of the biological connection is that it offers the natural father an opportunity that not other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." (Id., at p. 262, 103 S.Ct. at p. 2993.)

A fair reading of the case can not support a contention that Bob must have been successful against all obstacles.

In *Michael H. v. Gerald D.* (1989) 491 U.S.. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (Michael H.) even in the extremes circumstance of that case the mother being married to and living with her husband who was not her child's biological father a majority of the justices were solicitous of the rights of unwed fathers. The determinative factor is, given the opinions at the U.S. Supreme Court, whether a biological father attempted to establish a relationship with his child, Bob has certainly done so but he has been denied the opportunity to assume any parental responsibilities as a result of Mary and John's actions. He has simply been refused the opportunity.

The theme that emerges from the high court's analysis is that the biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that biological connection into a full and enduring relationship. *Adoption of Kelsey S.*, 823 P.2d 1216 (Cal. 1992) at pp. 1223-1228, 1 Cal. 4th 816, 4 Cal.Rptr.2d 615. Bob has made every reasonable and prompt effort to protect those rights. It is also equally clear that the district court has failed to apply the protections that must constitutionally be afforded an unwed father on these facts.

The U.S. Supreme Court has in several cases recognized that the relationship between a parent and child is protected and has strongly suggested that a father in Bingham's position may not properly have his parental rights terminated absent a showing of his unfitness as a father.

CONCLUSION

The Court should grant the writ requested herein to provide necessary direction to the state courts as to the

proper due process and equal protection requirements as they relate to the unwed father and in this particular instance to address the specific conflicts with the relevant decisions of the U.S. Supreme Court apparent in the state court decision.

Respectfully submitted,

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Date: January 16, 1996

APPENDIX A

No. 95-019
IN THE SUPREME COURT OF THE STATE OF MONTANA
1995

IN THE MATTER OF THE PATERNITY
OF "ADAM," A Minor Child

"BOB,"
Petitioner and Appellant,

and

"MARY" and "JOHN,"
Defendants and Respondents.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and for the County of Gallatin,
The Honorable Thomas A. Olson, Judge presiding.

COUNSEL OF RECORD:

For Appellant:
Robert G. McCarthy; Hennessey, Joyce, McCarthy & Wing, Butte, Montana

For Respondents:
John M. Morrison; Meloy & Morrison, Helena, Montana

Submitted on Briefs: May 25, 1995
Decided: September 29, 1995

Filed: Ed Smith
Clerk

Justice W. William Leaphart delivered the Opinion of the Court.

"Bob" appeals from an order of the Eighteenth Judicial District Court, Gallatin County, concluding that it was not in "Adam's," a minor child, best interest to declare paternity in "Bob."[1] We affirm.

BACKGROUND

"Mary" and "John" moved to Bozeman together in 1990 to establish a restaurant and bakery. At that time, Mary and John lived together and their relationship was platonic. Mary met Bob in a business context in 1991 and thereafter they began an intimate relationship. Bob moved into Mary's and John's apartment in the early months of 1992. In April 1992, Bob's and Mary's relationship ended and Bob moved out of Mary's and John's apartment.

In late May of 1992, Mary learned that she was pregnant. In June of 1992, Mary requested that Bob relinquish his parental rights. Bob refused. Mary and John married on September 9, 1992. On December 15, 1992, Bob filed what was titled a "Notice of Intent to Claim Paternity" with the Clerk of Court for the Eighteenth Judicial District, Gallatin County. Mary gave birth to Adam on December 21, 1992. John was listed as Adam's father on the birth certificate.

On January 5, 1993, Bob filed a petition in which he asserted that he was Adam's biological father. Bob sought a determination of Adam's paternity and a determination of child custody, visitation, and child support obligations. The

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1 Pseudonyms have been used in place of the parties' actual names.

court appointed a guardian ad litem to monitor Adam and report to the court on a monthly basis. The parties agreed to submit the question of Bob's standing for a pretrial ruling. The court ruled that Bob did have standing to challenge the presumption that John was the father pursuant to § 40-6-107(1), MCA.

The District Court ordered blood drawn from Bob, John and Adam to determine paternity. Mary and John opposed the order for blood samples and sought a writ of supervisory control from this Court. We denied the writ. Without waiving her right to object to a judicial determination of the father/child relationship, Mary stipulated that Bob was Adam's biological father.

After a bench trial, the court issued Findings of Fact and Conclusions of Law in which it determined that it was not in Adam's best interest to declare paternity in Bob and, thus, dismissed Bob's petition. Mary and John raise numerous issues which we do not address because they neither appealed nor cross-appealed. See Rule 4, M.R.App.P. Bob's three issues are summarized as follows:

1. Whether the District Court erred when it used the best interest of the child as the standard for determining whether to make a judicial declaration of paternity.
2. Whether Mary is estopped from denying that Bob is the natural father.
3. Whether the District Court erred in denying Bob's motion for a continuance.

DISCUSSION

1. Whether the District Court erred when it used the best interest of the child as the standard for determining whether to make a judicial declaration of paternity.

The District Court recognized that Bob was, in all probability, Adam's biological father. However, in its order determining paternity, the District Court stated that "it is not in [Adam's] best interest to determine paternity in [Bob]." In its order denying Bob's motion to reconsider, the District Court stated that "none of the arguments set forth in [Bob's] brief persuade the court that a different decision would be in [Adam's] best interest." Bob argues that the District Court erred in using the "best interest of the child" standard and, for the first time on appeal, that the District Court failed to consider his constitutional rights to equal protection and due process in its balancing of "conflicting presumptions of paternity and legitimacy." We disagree.

This is a case of first impression in Montana. We therefore look to other jurisdictions for guidance in applying the Uniform Parentage Act (UPA). The District Court relied heavily on *Lehr v. Robertson* (1983) , 463 U.S. 248, 103 S.Ct 2985, 77 L.Ed.2d 614. Lehr was the putative father of a child born out of wedlock. The mother married another man after the child was born. When the child was about two years old, the husband was granted a decree of adoption. Although he never supported the child or offered to marry the child's mother, Lehr then filed an action to challenge the adoption as violating his rights of due process and equal protection. In rejecting Lehr's arguments, the United States Supreme Court drew a distinction between a "developed parent-child relationship" as opposed to a "potential" relationship.

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child, " *Caban,* 441 U.S., at 392, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. *At that point it may be said that*

> *he "act [s] as a father toward his children." Id. at 389, n.7. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds.* " [T] he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children. . . as well as from the fact of blood relationship." [Citations omitted; emphasis added.]

Lehr, 463 U.S. at 261. The Court then went on to explain that the biological connection merely gives a natural father the opportunity to become a "parent":

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Lehr, 463 U.S. at 262.

On December 15, 1992, prior to Adam's birth, Bob filed a "Notice of Intent to Claim Paternity" with the Clerk of the Eighteenth Judicial District Court. Section 40-6-105, MCA, provides in relevant part:

> A man is presumed to be the natural father of a child if: (a) he and the child's natural mother are or have been married to each other and the child is born during the

marriage or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce or after a decree of separation is entered by a court;

. . . ;

(d) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child; or

(e) he acknowledges his paternity of the child in a writing filed with the department of health and environmental sciences or with the district court of the county where he resides, which court or department shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the department of health and environmental sciences or with the district court of the county where the acknowledgment was filed. If another man is presumed under this section to be the child's father, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted.

(2) *A presumption under this section may be rebutted in an appropriate action by a preponderance of the evidence.* [Emphasis added.]

In this case, subsections (a) and (d) favor John as the natural father. These presumptions in John's favor, however, are rebutted by Mary's acknowledgment that Bob is the biological father. See *In re Marriage of Miller* (1992), 251 Mont. 300, 825 P.2d 189, in which a statutory presumption of paternity was rebutted when mother and husband acknowledged under oath that the husband was not the

natural father. In addition, subsection (e) supports Bob's claim to paternity since he filed an acknowledgment which the natural mother did not dispute.

Although the UPA utilizes a "best interest" standard in certain contexts, it does not specifically establish that standard for determining whether a court should declare the father/child relationship.[2] The court, therefore, based its decision on case law from other states as well as UPA guidelines which it interpreted as promoting legitimacy.

The California Court of Appeals has held that even if a putative father establishes his biological paternity to a child conceived out of wedlock, but born after the mother married another man, the nature of his relationship to the child is governed by the best interest of the child. *Michael M. v. Giovanna F.* (Cal. Ct. App. 1992), 7 Cal.Rptr.2d 460, 468.

The Washington Supreme Court has held that "[t]he best interest of the child standard does not entitle a court to presume that paternity determination is *automatically* in the child's best interest." *McDaniels v. Carlson* (Wash. 1987), 738

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2 Section 40-6-130, MCA, provides that when a child is the subject of an adoption proceeding, the court must determine whether it will be in the best interest of the child to award custody to the putative father. Since Adam is not the subject of an adoption proceeding, this section is inapplicable. Section 40-6-114, MCA, provides for a pretrial recommendation of whether judicial determination of paternity would be in the best interest of the child. If the recommendation is not accepted and the matter goes to trial, the UPA does not provide a standard for resolution of the paternity issue.

Section 40-6-116 (3) (a) , MCA, allows the judgment of the court determining the existence or nonexistence of the parent/child relationship to address such things as custody, visitation, bond "or any other matter in the best interest of the child."

P.2d 254, 261. The court in *McDaniels* set out factors to be considered when determining whether a paternity determination is in the child's best interest:

> [I]n determining whether it is in the child's best interest to allow a paternity action by one outside the present family, the trial court should consider the stability of the present home environment, the existence or lack thereof of an ongoing family unit, the extent to which uncertainty of parentage already exists in the child's mind, and any factors which may be relevant in assessing the potential benefits or detriment to the child.

McDaniels, 738 P.2d at 262. A court must conclude that paternity determination is in the child's best interest based on the facts in the record. *In re Marriage of Ross v. Austin* (Kan. 1990), 783 P.2d 331, 339.

We agree with the District Court's analysis and adopt the "best interest of the child" standard for deciding whether there should be a judicial declaration of the father/child relationship in a paternity dispute under Montana's UPA. In determining whether paternity should be declared in Bob, the District Court considered: the parties' relationships with each other, their lifestyles and incomes; testimony from the parties, testimony from Adam's guardian ad litem, and testimony from a social worker retained by Mary and John. The District Court concluded that based on §40-6-201, MCA, there is a rebuttable presumption that a child born into wedlock is legitimate. The court further considered the UPA's presumptions that a man is the natural father of a child if the man is married to the child's mother at the time of birth, §40-6-105 (1) (a) , MCA; that there is a presumption of

paternity when properly acknowledged, §40-6-105 (1) (e) , MCA; and that these presumptions of paternity are subject to rebuttal, §40-6-105(2), MCA.

Through the mother's stipulation that Bob was Adam's father, the statutory presumptions in favor of John as the biological father were rebutted. However, as pointed out by the United States Supreme Court in *Lehr*, that biological determination merely sets the stage for the next question: Is it in the best interest of Adam to judicially declare the father/child relationship and thereby grant Bob the prerogatives of a parent? The probability that Bob is the natural father, although a weighty factor in applying the best interest analysis, is not the controlling consideration in judicially determining the parent/child relationship. As set forth above, the best interest analysis requires the court to look beyond the biological ties. The court must consider: the existence of a home environment; the stability of the present home and family; the extent to which uncertainty of parentage already exists in the child's mind; the efforts and commitments (if any) that the putative father has taken to establish supportive and financial ties with the child; as well as any other factors which may be relevant in assessing the potential benefits or detriments to the child.

In the present case, the District Court considered that Bob is probably Adam's father, a fact essentially conceded by Mary. Further, the court noted that Bob has had no contact with Adam and has demonstrated no personal commitment to or responsibility for Adam; nor has he taken steps to obtain suitable employment or housing or to establish a child support fund. The District Court weighed these facts against the stability of Mary's and John's marital relationship, their care for Adam, and their financial stability. The District Court noted that John's name appears on Adam's birth certificate, that Adam has always lived with Mary and John and they

all share a strong emotional relationship, and that Adam is, by all accounts, loved and well cared for in a safe and suitable home environment.

Application of the "best interest of the child" test involves a discretionary decision by the district court. In reviewing discretionary rulings by the district court we apply the abuse of discretion standard. *Montana Rail Link v. Byard* (1993), 260 Mont. 331, 337, 860 P.2d 121, 125. We hold that the District Court did not abuse its discretion in deciding not to declare the father/child relationship in Bob. Rather, it correctly applied the "best interest of the child" test by considering the stability of the family relationship of Mary and John contrasted with Bob's failure to show any commitment towards establishing a "parental" as opposed to a biological role. The court properly concluded that it was not in Adam's best interest to judicially declare paternity in Bob.

Bob did not raise the constitutional issues of equal protection or due process below. We have held that issues not raised before the district court are generally not considered on appeal. *Miller v. Catholic Diocese of Great Falls* (1986), 224 Mont. 113, 116, 728 P.2d 794, 795. We therefore decline to further consider Bob's constitutional issues.

3. Whether the District Court erred in denying Bob's motion for a continuance.

Bob argues that the District Court abused its discretion when it denied his motion for a continuance when the guardian ad litem and the attorney for the guardian ad litem, had not been given notice of the trial and the guardian ad litem had not revised her report to the court. We disagree.

Bob did not subpoena the guardian ad litem, she therefore proceeded with a planned vacation and was out of state at the time of trial. By express agreement of both parties, she

testified by telephone. She testified that she relied "on common sense" and that she had not seen Adam in seventeen months. She appears to have made only limited efforts to monitor and report on Adam. Given these facts, we hold that the District Court did not abuse its discretion when it denied Bob's motion for an extension of time so that the guardian ad litem could update her report. To conclude on this issue, we note that the guardian ad litem did not appeal the decision of the District Court.

Affirmed.

W. William Leaphart
Justice

We concur:

J.A. Turnage
Chief Justice

Karla M. Gray
William E. Hunt, Sr.
Terry Trieweiler
Justices

APPENDIX B

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT,
GALLATIN COUNTY

* * * * * *

IN THE MATTER OF THE PATERNITY	)	
	)	
OF T.C., A Minor Child,	)	
	)	
MICHAEL D. BINGHAM,	)	
	)	
Petitioner,	)	
	)	
and	)	Cause No. DR 93-4
	)	
AMELIA CAIN and GARY DIPAOLO,	)	
	)	
Respondents.	)	
	)	

ORDER DENYING MOTION TO RECONSIDER

Petitioner has filed a motion to reconsider this court's Findings of Fact, Conclusions of Law and Order dated October 10, 1994. Respondents oppose the motion. The court now denies petitioner's motion to reconsider. The court acknowledges petitioner's frustration with the decision entered, but none of the arguments set forth in petitioner's brief persuade the court that a different decision would be in T. C.'s best interest.

Dated this 29th day of November, 1994.

/s/ Thomas A. Olson
HON. THOMAS A. OLSON
District Judge

APPENDIX C

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT,
GALLATIN COUNTY

* * * * * * *

IN THE MATTER OF THE PATERNITY of T. C., A Minor Child, MICHAEL D. BINGHAM, Petitioner, and AMELIA CAIN and GARY DIPAOLO, Respondents.	Cause No. DR 93-4

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 19, 1994, a judge trial in the above-entitled matter was held before the Honorable Thomas A. Olson, District Judge. Present in court were petitioner, with his attorney Robert McCarthy, and respondents with their attorney, John M. Morrison. After proof heard, the court gave the parties 20 days to submit proposed findings of fact and conclusions of law, and the matter was thereafter taken under advisement. The court now makes the following:

FINDINGS OF FACT

1. Petitioner Michael D. Bingham is a resident of Bozeman, Gallatin County, Montana. He is an unmarried man.

Respondents Amelia Cain and Gary DiPaolo are residents of Bozeman, Gallatin County, Montana. They were married on September 9, 1992, in Billings, Montana.

2. The minor child, T. C., was born into the marriage of respondents on December 21, 1992, in Bozeman, Gallatin County, Montana. Respondents are listed as T. C.'s parents on his birth certificate.

3. On December 15, 1992, petitioner filed a Notice of Intent to Claim Paternity with the Clerk of Court for the Eighteenth Judicial District, Gallatin County, Montana, allegedly pursuant to section 40-6-126, MCA.

4. On January 5, 1993, petitioner filed a petition to determine paternity an custody and support of T. C., contending that he is the biological father of T. C. and requesting the court determine his parental rights of custody and visitation.

5. On September 1, 1993, petitioner filed a motion for summary judgment on the ground that respondents had not denied his paternity of T. C. and that he was entitled to a court order declaring him to be the father. Respondents opposed the motion and filed a cross-motion to dismiss the petition on the grounds that petitioner lacked standing to challenge the paternity of a child born into the marriage of another. The parties subsequently agreed to submit only the issue of standing to he court. On December 12, 1993, the court issued an order holding that petitioner had standing to file his petition pursuant to section 40-6-107(1), MCA.

6. On February 18, 1994, the court held a pre-trial hearing pursuant to section 40-6-111 through -114, MCA. Petitioner requested blood test of the parties pursuant to section

40-6-112, MCA, and the court granted petitioner's request over the objection of respondents. After presentation of the parties' positions, it appeared to the court that there was no possibility of the parties reaching an agreement, and the court set the matter for trial pursuant to section 40-6-114(6), MCA.

7. On March 3, 1994, respondents petitioned the Montana Supreme Court for a writ of supervisory control, which was denied by the Court on April 25, 1994.

8. On May 10, 1994, respondents filed a motion to waive blood tests and filed a "confidential stipulation" that respondent Amelia Cain would stipulate petitioner was the biological father of T. C. for purposes of the trial to determine whether the identity of the biological father should remain confidential, without waiving her rights to object to a legal determination of paternity. By order dated June 6, 1994, the court denied respondents' motion to waive blood tests, and ordered that the results of the tests be sealed by the testing laboratory and sent directly to the court. The blood tests results were received and sealed by the court on June 24, 1994.

9. On August 19, 1994, a judge trial on the issues of paternity, whether it is in the child's best interest to declare paternity, and whether the identity of the biological father should remain confidential came before the court. The court heard testimony of the parties and their witnesses. Anita Nybo, the court appointed guardian ad litem, testified by telephone with the consent of the parties.

10. Petitioner testified that he was the biological father of T. C., which respondent Cain also conceded. Petitioner testified that he was romantically involved with Cain from

February 1992 through March 1992, at which time Cain allegedly broke off the relationship. He testified that he and Cain had discussed getting married and having children, and that they made a mutual decision to have Cain become pregnant. He stated that he had verbally offered financial support to Cain but that she had refused all offers. He did not send her any money, nor did he establish any type of trust or other fund for T. C.. He stated the "would have made any contributions we would've agreed to."

Petitioner was evasive in his testimony on the stand. He stated his employment was "diverse", including art direction for movie production projects, selling restaurant equipment and "consulting" work, although he never elaborated on what "consulting" meant. He said he was on the payroll of Authentic Enterprises, a corporation of which he was the president, and which is in the process of winding up. The corporation was formed for the purpose of opening up a restaurant, DeVilles, which has never gotten off the ground. Petitioner filed a financial affidavit with the court on August 19, 1994, in which he indicated a 1993 income of $18,000.00, an estimated 1992 income of $25,000.00, and an estimated 1991 income of $12,000.00. He has not filed income tax forms since 1986. He did not state how this income was earned. He testified he has no savings or checking account, no stocks, bonds, or other liquid assets. He "believed" he owned a truck which he got from Darrell Smith, owner of Bridger Pawn Shop.

Petitioner testified that he is currently living at 626 West Main, in space located behind Bridger Pawn Shop. He indicated that this was temporary housing and that when visitation with T. C. begins, he has made arrangements with a woman named Sue Ann Haggarty who would give

him a rental apartment. He stated he would work with a court appointed child psychologist to implement a visitation schedule among the parties, and that he would abide by any order for child support established by Montana Social and Rehabilitative Services, Child Support Enforcement Division.

He acknowledged that he and T. C. were "total strangers" at this point in time. He stated his purpose in seeking a paternity determination is that he and T. C. "had rights to each other" and should share an ongoing life together. He echoed the guardian ad litem's statement that "Honesty is the best policy", in reference to placing his name as father on T. C.'s birth certificate and telling T. C. who his biological father is. Petitioner gave no testimony other than this as to why it was in T. C.'s best interests to make a determination of paternity in him.

11. Respondents Cain and DiPaolo have lived together since 1987, and moved to Bozeman in 1990. They are partners in Bagelworks, a restaurant and bagel shop in Bozeman. They were living together as friends in February - March 1992, when Cain was sexually involved with petitioner. Cain testified that when she was involved with petitioner, she and he discussed marriage and starting a family. She also acknowledged that her decision to become pregnant was mutual with petitioner. She stated that petitioner lived with her and DiPaolo for two months in 1992. She said the three of them took a trip to California in March 1992, at which time she began to develop doubts about petitioner and was beginning to be "put off" by his evasiveness. She asked him to move out so they could have some time apart to think about where they were going with the relationship, and petitioner told her that "if I go, that's it."

She testified that after petitioner moved out, he avoided her, refusing to speak to or acknowledge her when he came into the bagel shop or otherwise. When she found out she was pregnant, she contacted him. In June 1992, she asked him to sign a relinquishment of parental rights because he had made it clear he did not want to marry her, he was being nasty and intimidating to her, and she wanted to get on with her life. Petitioner refused to sign the paper she had prepared. In December 1992, before the baby was born, petitioner told her he had filed a notice of intent to claim paternity and he would come and take the baby when it was born. Cain testified that petitioner had never offered her any financial or emotional support, and that the one time she asked him if he would share the prenatal expenses with her, he said, "I know I'm going to owe you some stuff."

Cain married DiPaolo September 9, 1992 in Billings, Montana, before a justice of the peace. There were no friends in attendance at the ceremony, and Cain stated they did not want to publicly announce their marriage. She testified that DiPaolo was emotionally and financially supportive of her throughout her pregnancy. DiPaolo did all the running around at the bagel shop while she was pregnant, attended doctor appointments with her, and comforted her when she was despondent about the conflicts arising surrounding her pregnancy. After T. C. was born, Cain and DiPaolo shared equally the responsibility for his care, alternating shifts at the bagel shop so one parent would always be home with T. C.. She acknowledged that they were in good financial shape and had no need for support money from petitioner. They have recently purchased a house in Bozeman.

Cain stated she would never refuse contact between petitioner and T. C., but also said that he never asked

her for visitation and she never invited it. She stated that petitioner had ignored her after they broke up in March 1992, that he expressed no intention of marrying her after she found out she was pregnant, and that she decided to get on with her life and provide the most stable environment for her child possible. She had always been good friends with DiPaolo, she loves him and he loves her, and they were committed to their marriage and providing a peaceful home for T.C..

12. The guardian ad litem, Anita Nybo, filed a report with the court on April 22, 1993, in which she recommended that if blood testing indicated petitioner was T. C.'s biological father, all parties be assessed by a psychologist "to determine what is motivating them to behave the way they are", and for the parties to seek further counseling if the need is shown. Ms. Nybo had one visit each with the parties, their attorneys, and Jan Alpel, head of the Montana Institute of Family Counselors. At the time her report was written, she indicated petitioner was willing to go to counseling and comply with a reasonable visitation schedule. She indicated that Cain was very angry with petitioner and was much less willing to cooperate with him.

13. Ms. Nybo acknowledged that she had not met personally with either of the parties since her one meeting with them when T. C. was two months old, when she spent approximately one and one-half hours with each. She did not follow up with her March 1993 report because she felt that Cain expressed a great deal of hostility toward her after her report was filed, and that further interactions with her would be unproductive. Ms. Nybo also did not receive the notice from the court setting the August 19th trial, so she did not have time to prepare a revised report.

In her telephone testimony, Ms. Nybo believed that it was important for T. C.'s long term best interests that there be honesty and openness about his parentage, and that it would be traumatic for a child to find out later in life that people had not been honest about the child's biological parentage.

14. Respondents presented the testimony of Suzy Saltiel, a social worker hired by them who met with respondents and T. C. on several occasions over the last six months for the purposes of testifying as to whether it was in the best interest of T. C. to preserve the present nuclear family or to declare someone outside the family as the father. Ms. Saltiel spent five and one-half hours in direct contact with respondents and T. C., and ten hours of research on the issues of biological versus psychological parents and the best interest of the child. One treatise she relied on was *Beyond the Best Interest of the Child*, by Goldstein, Freud and Solnit, a treatise referred to by the courts in other paternity cases. Her observations of respondents and T. C. showed a safe, suitable home environment; loving relationships between respondent, and between respondents and T. C; and significant bonding between T. C. and respondents. Ms. Saltiel conducted no interviews or investigations of petitioner.

Ms. Saltiel did not believe, and found no basis in her experience or research which would indicate, that it would be in T. C.'s best interest to change the name on his birth certificate. She "absolutely" believes, based on her work with foster and adoptive families, that a child should be told who his or her biological parent is. Her opinion was that most children between the ages of 6 and 8 years old had the capacity to grasp the concept of "another" parent or a "biological" parent. She emphasized that each child's comprehension and reaction

to this depended on their individual developmental level. She favored a gradual physical introduction of the child and biological parent when the child indicated a readiness and interest in such matters. She stated that the reason for not introducing petitioner now as T. C.'s biological father was that it would disrupt the child's sense of continuity and trust in his primary caretakers, and that it was important for very young children to establish this sense of trust as a foundation for the rest of their lives.

From the foregoing findings of fact, the court enters the following conclusions of law:

CONCLUSIONS OF LAW

1. The court has jurisdiction over this matter.

2. The issue before the court is whether it is in the best interests of the minor child, T. C., to determine paternity in petitioner Michael Bingham when T. C. has a presumed legal father in respondent Gary DiPaolo. In order to resolve this issue, the court must weigh conflicting presumptions of paternity and legitimacy.

   There is a presumption that all children born in wedlock are legitimate. Section 40-6-201, MCA. This presumption is disputable. Section 26-1-602, MCA. The presumption of legitimacy is one of the oldest and strongest in our jurisprudence. *Michael H. v. Gerald D.*, 491 U.S. 110,124-25 (1989); *Marriage of Ross*, 783 P.2d 331, 335 (Kan. 1989); *Willmon v. Hunter*, 761 S.W. 2d 924 (Ark. 188); *Lonning v. Leonard*, 767 S. W. 2d 577 (Mo. App. 1988).

   There are also presumptions concerning paternity under the Uniform Parentage Act. (UPA), enacted in Montana at section 40-6-101, *et seq.*, MCA. The Act presumes a man is the natural father of a child if, under

subsection 40-6-105(1))a), the man is married to the child's natural mother at the time of the child's birth. There is also a presumption of paternity under subsection 40-6-105(1) (e), if man files acknowledgment of paternity with the district court and the mother does not dispute the acknowledgment in writing within a reasonable time of being informed thereof. Subsection 40-6-105(1) (e) also states: "If another man is presumed under this section to be the child's father, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted." A presumption of paternity "may be rebutted in an appropriate action by a preponderance of the evidence." Section 40-6-105(2), MCA.

An "appropriate action" is not defined, but is presumably one contemplated by the procedure thereafter set forth at sections 40-6-107 through 40-6-117, MCA. As discussed in this court's previous order of December 3, 1993, "any interested party" may bring a paternity action, including an unwed putative father. However, standing to bring a paternity action "does not automatically imply that the action is in the child's best interest." *McDaniels v. Carlson,* 738 P.2d 254, 262 (Wash. 1987), followed in *Marriage of Ross,* 783 P.2d at 337. Section 40-6-114(1), MCA, requires the presiding judge, based on information produced at a pretrial hearing, to evaluate the probability of determining the existence of a father and child relationship at trial, and whether such declaration would be in the child's best interests.

3. The courts of Arizona, Kansas, and Washington have held that the court should consider the issue of whether it is in the best interest of the child to establish paternity *before* blood tests are taken. *See, Ban v. Quigley,* 812 P.2d 1014 (Ariz.App. 1990); *McDaniels v. Carlson,* 739 P.2d 254

(Wash. 1987); *Marriage of Ross*, 783 P.2d 331 (Kan. 1990). In *Marriage of Ross*, the district court's order requiring blood tests was reversed by the Kansas Supreme Court and the district court was ordered not to consider such results until the best interest determination was conducted. Montana statues appear to require the taking of blood tests both upon the request of a party and when a party refuses to accept a recommendation made by the judge at a pretrial hearing. See, sections 40-6-112(1) and 40-6-114(3), MCA. Section 40-6-114(3) states:

"If a party refuses to accept a recommendation made under subsection (1) and blood tests have not been taken, the court shall require the parties to submit to blood tests, if practicable. Thereafter the judge or referee shall make an appropriate final recommendation. If a party refuses to accept the final recommendation, the action shall be set for trial."

Since the court has not addressed the best interest of T. C. yet in this proceeding, the court will do so now prior to considering the results of the blood test.

4. There is not a statutory "best interests" standard set forth in the UPA as there is in dissolution proceedings at section 40-4-212, MCA. However, paternity cases decided under the UPA offer guidance about what factors should be considered by the trial court.

The purpose of the UPA is to provide "substantive legal equality for all *children* regardless of the marital status of their parents" in order to fulfill the mandate of the Constitution. Uniform Parentage Act, 9A U.L.A. at 581 (1979) (emphasis added); *see also, Marriage of Ross*, 783 P.2d at 335. The rights of the child include the rights to support, inheritance, family bonds, and accurate

identification of his parents. *McDaniels v. Carlson,* 738 P.2d at 261. The putative parent has an interest in family bonds and in not being erroneously required to pay child support. *Id.* The State has an interest in protecting the public from supporting children born out of wedlock and in accurately determining who should pay support. *Id.* "Where these rights come into conflict, the rights of the child should prevail." *Id.* The determination of a child's best interests will always depend on the particular circumstances of the case and the needs of the implicated child. *Id.* at 262.

In *McDaniels,* the factors considered by the court were the continuity of established relationships, the stability of the child's present home environment, the existence or lack thereof of an ongoing family unit, and the extent to which uncertainty of parentage existed in the child's mind. The facts in *McDaniels* were that the natural mother was married to one man but also was involved in a relationship with another man, that both men cared for the child at different times, and both men had developed strong bonds with the child who referred to them as "daddy Gary" and "daddy Shawn".

In *C.C. v.A.B.,* 550 N.E. 2d 365, 372 (Mass. 1990), the court determined that prior to presenting paternity evidence, a court must consider whether a "substantial parent-child relationship" exists. Among factors to be considered were existing emotional bonds, economic support, custody of the child, the extent of personal association, the commitment of the putative father to attending to the child's needs, the consistency of the putative father's expressed interest, the child's name, and the names listed on the birth certificate. The facts in *C. C. v. A. B.* were that the putative father sought to establish paternity of a child born into the marriage of the natural

mother and her husband. At the time of the child's conception and birth, the mother was living with the putative father, the putative father was listed on the child's birth certificate and baptismal record, and the putative father had spent time caring for the child before the mother ended the relationship and reconciled with her husband.

5. The factors considered by this court are as follows:

   a. The probability of petitioner being the natural father of T. C. is high, and is essentially conceded by respondent Cain.
   b. Petitioner and Cain had a two month romantic relationship.
   c. Cain and DiPaolo had been friends since 1987, and are now husband and wife. They indicate every intent to continue their marital relationship. The are financially stable.
   d. T. C. was born into the marriage of Cain and DiPaolo. They are listed as his parents on his birth certificate. His surname on his birth certificate is Cain-DiPaolo.
   e. T. C. is now approximately 20 months old, has always lived with and been cared for by respondents, and has developed strong emotional bonds with respondents as his primary caregivers. By all accounts, T. C. is loved and well cared for in a safe and suitable home environment.
   f. T. C. and petitioner have had minimal contact with each other and are, in the words of petitioner, "total strangers". However, the lack of contact between the two is in no small measure due to the length of these proceedings. Petitioner promptly began paternity proceedings and should not be punished for complying with legal procedure.

g. The court is most concerned with petitioner's commitment to focusing on T. C.'s needs. Petitioner has not demonstrated personal responsibility in other areas of his life - business, financial or personal. While he verbally expresses a willingness to be cooperative with visitation and assume financial responsibilities for T. C., he has taken no steps in this direction by finding steady employment, suitable housing, or establishing any child support fund. None of his testimony on the witness stand demonstrated an appreciation for, or understanding of, a child's needs for emotional stability and continuity, let alone the practical aspects of rearing a toddler.

6. The ideal situation for T. C., as for any child, would be to be loved and cared for by everyone, acting in harmony and peace. This is difficult in divorced families, and unlikely in the present case. Given the dynamics of the parties, the court cannot envision how it would be in T. C.'s best interests to uproot him from the only family he has known, change his birth certificate to reflect the name of someone his mother was never married to, and begin shuttling him back and forth between petitioner and respondent. While the court appreciates the desire of the petitioner to establish a bond with his progeny, "the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds." *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

> "The significance of the biological connection is that if offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. if he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child

relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." *Id.* at 262.

7. In *Michael H. v. Gerald D.*, 491 U. S. 110 (1989), the Supreme Court in a plurality decision determined that California's presumption of legitimacy statute[1] did not infringe upon the due process rights of the putative father or of the child. The facts of *Michael H.* are more compelling than the present case: the biological father had actually established a relationship with his daughter, and had lived with the child and her mother off and on for three years, while the mother was married to her husband. This opinion, coupled with the stability of the family unit established by Cain, DiPaolo and T. C., convinces the court it would not be in T. C.'s best interest to declare paternity in petitioner.

From the foregoing findings of fact and conclusions of law, the court enters the following order:

ORDER

The court finds that it is not in T. C.'s best interest to determine paternity in petitioner. The record in this matter shall remain sealed and confidential. Petitioner's petition is dismissed.

Dated this 10th day of October, 1994.

/s/ Thomas A. Olson
HON. THOMAS A. OLSON

---

[1] Cal. Evid. Code Ann. section 621 provided that a child born to a married woman living with her husband was presumed to be a child of the marriage, and the presumption could only be rebutted by the husband or wife under limited circumstances. *Michael H. v. Gerald D.*, 491 U. S. at 113, 115, 117-18.

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 95-019

IN THE MATTER OF THE PATERNITY OF "ADAM," a minor child, "BOB," Petitioner and Appellant, v. "MARY" and "JOHN," Defendants and Respondents.	O R D E R

The petition for rehearing is denied.

DATED this 19th day of October, 1995.

/s/ J.A. Turnage
Chief Justice

/s/ Karla M. Gray

/s/ William E. Hunt, Sr.

/s/ Terry Trieweiler

/s/ W. William Leaphart
Justices

APPENDIX E

THE CONSTITUTION OF THE UNITED STATES

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereor, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor den to any person within its jurisdiction the equal protection of the laws.

THE CONSTITUTION OF THE STATE OF MONTANA
ARTICLE II. DECLARATION OF RIGHTS

Section 4. Individual dignity.

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

THE CONSTITUTION OF THE STATE OF MONTANA
ARTICLE II. DECLARATION OF RIGHTS

Section 17. Due process of law.

No person shall be deprived of life, liberty, or property without due process of law.

MONTANA CODE ANNOTATED TITLE 26. EVIDENCE CHAPTER 1. STATUTORY PROVISIONS ON EVIDENCE PART 6. PRESUMPTIONS

26-1-602. Disputable presumptions.

All other presumptions are "disputable presumptions" and may be controverted by other evidence. The following are of that kind: . . .

(31) A child born in lawful wedlock, there being no divorce from bed and board, is legitimate.

. . .

40-6-102. Parent and child relationship defined.

As used in this part, "parent and child relationship" means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

History: En. 61-302 by Sec. 2, Ch. 512, L. 1975; R.C.M. 1947, 61-302.

MONTANA CODE ANNOTATED TITLE 40. FAMILY LAW CHAPTER 6. PARENT AND CHILD PART 1. UNIFORM PARENTAGE ACT

40-6-103. Relationship not dependent on marriage.

The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

History: En. 61-303 by Sec. 3, Ch. 512, L. 1975; R.C.M. 1947, 61-303.

MONTANA CODE ANNOTATED TITLE 40. FAMILY LAW CHAPTER 6. PARENT AND CHILD PART 1. UNIFORM PARENTAGE ACT

40-6-105. Presumption of paternity.

(1) A man is presumed to be the natural father of a child if:

(a) he and the child's natural mother are or have been married to each other and the child is born during the marriage or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce or after a decree of separation is entered by a court;

(b) before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:

(i) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) if the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation;

(c) after the child's birth, he and the child's natural mother have married or attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:

(i) he has acknowledged his paternity of the child in writing filed with the department of health and environmental sciences or with the district court for the county where he resides; or

(ii) with his consent, he is named as the child's father on the child's birth certificate; or

(iii) he is obligated to support the child under a written voluntary promise or by court order;

(d) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child; or

(e) he acknowledges his paternity of the child in a writing filed with the department of health and environmental sciences or with the district court of the county where he resides, which court or department shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the department of health and environmental sciences or with the district court of the county where the acknowledgment was filed. If another man is presumed under this section to be the child's father, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted.

(2) A presumption under this section may be rebutted in an appropriate action by a preponderance of the evidence.

History: En. 61-305 by Sec. 5, Ch. 512, L. 1975; R.C.M. 1947, 61-305.

MONTANA CODE ANNOTATED TITLE 40. FAMILY LAW CHAPTER 6. PARENT AND CHILD PART 1. UNIFORM PARENTAGE ACT

40-6-107. Determination of father and child relationship — who may bring action.

(1) Any interested party may bring an action for the purpose of determining the existence or nonexistence of the father and child relationship presumed pursuant to 40-6-105.

(2) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under 40-6-105 may be brought by the child, the mother or personal representative of the child, the

department of social and rehabilitation services or its appropriate local affiliate, the department of family services or its appropriate local affiliate, the personal representative or a parent of the mother if the mother has died, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor.

(3) Regardless of its terms, an agreement, other than an agreement approved by the court in accordance with 40-6-114(2), between an alleged or presumed father and the mother or child does not bar an action under this section.

(4) If an action under this section is brought before the birth of the child, all proceedings shall be stayed until after the birth, except service of process and the taking of depositions to perpetuate testimony.

History: En. 61-307 by Sec. 7, Ch. 512, L. 1975; R.C.M. 1947, 61-307; amd. Sec. 32, Ch. 609, L. 1987.

MONTANA CODE ANNOTATED TITLE 40. FAMILY LAW CHAPTER 6. PARENT AND CHILD PART 1. UNIFORM PARENTAGE ACT

40-6-126. Notice of intent to claim paternity.

(1) Before the birth of a child born out of wedlock, a person claiming under oath to be the father of the child may file a verified notice of intent to claim paternity with the district court in any county of this state. The form of the notice shall be prescribed by the director of the department of health and environmental sciences and supplied to the clerks of the district courts. The notice shall include the claimant's address. On the next business day after receipt of the notice, the court shall transmit the notice to the records and statistics bureau of the department of health and environmental

sciences. If the mother's address is stated on the notice, the records and statistics bureau shall send a copy of the notice by first-class mail to the mother of the child at the stated address.

(2) A person filing a notice of intent to claim paternity or acknowledging paternity in accordance with 40-6-105 shall be presumed to be the father of the child for purposes of this part unless the mother denies that the claimant is the father. Such notice is admissible in a paternity proceeding under 40-6-107 and creates a rebuttable presumption as to the paternity of that child for purposes of that section. Such notice creates a rebuttable presumption as to paternity of the child for purposes of a dependency or neglect proceeding under Title 41, chapter 3.

(3) A person who makes a timely filing of notice of intent to claim paternity or who formally acknowledges paternity under 40-6-105 is entitled to notice of any hearing to determine the identity of the father of the child and any hearing to determine or terminate his paternal rights to the child.

History: En. 61-330 by Sec. 3, Ch. 422, L. 1977; R.C.M. 1947, 61-330.

MONTANA CODE ANNOTATED TITLE 40. FAMILY LAW CHAPTER 6. PARENT AND CHILD PART 1. UNIFORM PARENTAGE ACT

40-6-135. Relinquishment of parental rights — form, execution, and revocation.

(1) A parent or guardian who proposes to relinquish custody of a child for purposes of placing the child for adoption may do so by executing a relinquishment by which all parental rights to the child are voluntarily relinquished to the department of family services, a licensed adoption agency,

or the prospective adoptive parents. A parent may not execute a relinquishment to the department or a licensed adoption agency unless the department or the agency has agreed to accept custody of the child until the child is adopted.

(2) A relinquishment may be executed at any time, except that a birth mother may not execute a relinquishment before the child is 72 hours old.

(3) Except as otherwise provided in this section, a relinquishment must be by a separate instrument executed before a notary public.

(4) If the person from whom a relinquishment is required is a member of any of the armed services or is in prison, the relinquishment may be executed and acknowledged before any person authorized by law to administer oaths.

(5) If the relinquishment is executed in another state or country, the court having jurisdiction over the adoption proceeding in this state shall determine whether the relinquishment was executed in accordance with the laws of that state or country and may not proceed unless it finds that the relinquishment was so executed.

(6) Upon the filing of a properly and voluntarily executed relinquishment of a child by a parent or guardian, the court shall immediately issue an order terminating the rights of that parent or guardian to that child. If the rights of both parents, the surviving parent, or the guardian have been terminated and if the department of family services or a licensed adoption agency has agreed to accept custody of the child until the child is adopted, the court shall issue an order committing the child to the department or to the licensed adoption agency to which the relinquishment was given.

(7) Entry of an order terminating the rights of both parents pursuant to subsection (6) terminates the jurisdiction of the district court over the child in any divorce or separate maintenance action.

(8) Upon petition of a person who executed a relinquishment and of the department of family services or the licensed adoption agency to which the child was relinquished, the court with which the relinquishment was filed may grant a hearing to consider whether the relinquishment should be revoked. A relinquishment may not be revoked if the child has been placed for adoption. A verbatim record of testimony related to the petition must be made.

History: En. Sec. 1, Ch. 1, Sp. L. 1981; amd. Sec. 1, Ch. 225, L. 1987; amd. Sec. 2, Ch. 683, L. 1991.

MONTANA CODE ANNOTATED TITLE 40. FAMILY LAW CHAPTER 6. PARENT AND CHILD PART 2. OBLIGATIONS OF PARENTS

40-6-201. Legitimacy of children born in wedlock.

All children born in wedlock are presumed to be legitimate.

History: En. Sec. 280, Civ. C. 1895; re-en. Sec. 3738, Rev. C. 1907; re-en. Sec. 5830, R.C.M. 1921; Cal. Civ. C. Sec. 193; Field Civ. C. Sec. 86; re-en. Sec. 5830, R.C.M. 1935; R.C.M. 1947, 61-101.

APPENDIX F

JOSEPH W. SABOL II
Attorney and Counselor at Law
225 East Mendenhall
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(406) 587-9338
Attorney for Petitioner

MONTANA EIGHTEENTH JUDICIAL DISTRICT,
GALLATIN COUNTY

IN THE MATTER OF THE PATERNITY OF
T.C., A Minor Child — Cause No. DR93-4
MICHAEL D. BINGHAM,
Petitioner,
and
AMELIA CAIN and
GARY DIAPALO,
Respondents.

PETITION TO DETERMINE PATERNITY AND CUSTODY OF AND SUPPORT FOR A MINOR CHILD

COMES NOW the Petitioner, Michael D. Bingham, by and through his counsel Joseph W. Sabol II, to petition this Court for a determination of paternity for the minor child Timothy James Cain and for an order involving custody and support of the minor child. In support of this Petition, the Petitioner states as follows:

1. That the Petitioner resides in Gallatin County in the City of Bozeman as do both of the Respondents and the minor child and, therefore, this Court has jurisdiction pursuant to §40-6-109, MCA, to determine the issues of paternity, custody and support.

2. That the Petitioner is and at all times mentioned was an unmarried man.

3. That on various dates from, on or about, the 5th day of February, 1992, through the 18th day of April, 1992, Petitioner and Respondent Amelia Cain co-habitated with and engaged in sexual intercourse with each other, which acts resulted in the pregnancy of the Respondent Amelia Cain on or about the 23rd day of March, 1992.

4. That on the 21st day of December, 1992, in Bozeman, Montana, Respondent Amelia Cain gave birth to a male child named Timothy James Cain, of whom the Petitioner is the father.

5. That the minor child is living with and resides with the Respondents.

6. That the minor child is entitled to support from the Petitioner under the provisions of §40-6-116, MCA, and is entitled to have a guardian appointed for him during the pendency of this matter pursuant to §40-6-110, MCA.

7. That on the 15th day of December, 1992, the Petitioner filed with the Clerk of Court for the Eighteenth Judicial District Court in Gallatin County, Montana, a Notice of Intent to Claim Paternity, a copy of which is attached hereto, marked as Exhibit "A" for identification and by this reference fully and completely incorporated herein.

8. That by letter dated August 6, 1992, addressed to the Petitioner, Respondent Amelia Cain acknowledged Petitioner's paternity and requested Petitioner to acknowledge paternity and simultaneously relinquish parental rights. A copy of this correspondence and agreement is attached hereto, marked as Exhibit "B" for identification and by this reference fully and completely incorporated herein.

9. That Petitioner believes and therefore states that Respondent Gary Diapalo has been named as the father on the birth certificate of the minor child and, therefore, Respondent Gary Diapalo is a proper party to this action.

WHEREFORE, Petitioner requests and prays of this Court the following:

1. For an order appointing the minor child Timothy James Cain a guardian for the duration of this matter pursuant to §40-6-110, MCA;

2. For an order setting a time and place for an informal hearing pursuant to §40-6-111, MCA, at which time, evidence of paternity may be presented;

3. For an order declaring Petitioner Michael D. Bingham to be the father of the minor child Timothy James Cain and setting forth therein the Petitioner's obligation for support of the minor child together with appropriate provisions concerning custody and visitation for the Petitioner; and

4. For such other and further relief as the Court in its discretion may deem just and proper.

DATED this 5th day of January, 1993.

/s/ Joseph W. Sabol II
JOSEPH W. SABOL II
Attorney for Petitioner

VERIFICATION

STATE OF MONTANA)
: ss.
County of Gallatin)

MICHAEL D. BINGHAM, being first duly sworn deposes and says as follows:

That he is the Petitioner in the above entitled matter and has read the foregoing Petition and that the facts and matters contained therein are true and accurate to the best of his knowledge, information and belief.

/s/ Michael D. Bingham
MICHAEL D. BINGHAM

SUBSCRIBED AND SWORN to before me this 4th day of January, 1993.

/s/ Sharon C. Sargent
(SEAL) Notary Public for the State
of Montana
Residing at Bozeman, Montana
My commission expires: 10-3-94

EXHIBIT "A"

NOTICE OF INTENT TO CLAIM PATERNITY

STATE OF MONTANA)
: ss.
County of Jefferson)

I, MICHAEL D. BINGHAM, born on April 2, 1959, hereby serve notice that I intend to claim paternity of the child or children currently expected to be born to Amelia Cain, who resides at 708 W. Main, Bozeman, Montana 59715. Expected date of delivery between December 20 and December 31, 1992.

/s/ Michael D. Bingham
MICHAEL D. BINGHAM
1216 W. Lincoln
Bozeman, Montana 59715

Subscribed and sworn to before me this 15th day of December, 1992.

/s/ John H. Jardine
JOHN H. JARDINE
Notary Public for the State
of Montana
Residing at Whitehall, Montana
My Commission expires
Dec. 15, 1994

EXHIBIT "B"

August 6, 1992

Dear Mike,

Here is where I'm at. I've been thinking of you a lot lately and wish that I could be helping you out, now, *AT LEAST* as a good friend.

I have thought a lot about this and unfortunately have to stand firm in what I feel and believe in my heart is the best way I as the mother can protect this child from what may be a potential disturbance during its most precious and impressionable years.

If you could only grasp this innermost concern of mine and not look at this as me trying to "cut you out" then possibly you will find a trust in your heart to cooperate with me.

This is all I can do to express my seriousness about what *I feel* needs to be agreed upon now: #1 To look out for what may be disruptive for this child at some point. #2 For you to regain my trust and care, so maybe we can start a friendship.

OPTION A:

You make an appointment with me to sign an agreement I have drawn up, we sign it together, and we begin a hopefully long lasting good friendship.

OPTION B:

Until you make an appointment with me *and sign* the agreement I have drawn up - "you've let me down and you're out of my life".

/s/ AMELIA

AGREEMENT

I (Michael Bingham) hereby acknowledge that I am the father of the child to be born to Amelia Cain in December 1992 or January 1993 and hereby relinquish my parental rights to this child.

[not signed] _____ _____

Michael Bingham Date

[not signed] _____ _____

Amelia Cain Date

_____ _____

NOTARY PUBLIC Date

APPENDIX G

JOHN M. MORRISON
MELOY & MORRISON
80 South Warren
Helena, MT 59601
(406) 442-8670
Attorney for Respondents

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT,
GALLATIN COUNTY

IN THE MATTER OF THE PATERNITY OF T.C., A Minor Child	)	Cause No. DR-93-4
MICHAEL D. BINGHAM.	)	
Petitioner,	)	CONFIDENTIAL STIPULATION
and	)	
AMELIA CAIN and GARY DIPAOLO,	)	
Respondents.	)	

The undersigned, Amelia Cain DiPaolo stipulates, for purposes of the trial to determine whether the identity of the biological father should remain confidential, that Michael Bingham is the biological father of the minor child, T. C. D. The undersigned so stipulates because blood tests are not necessary to determine this fact and would, therefore, cause needless expense and intrusion into the privacy of the parties

and would further delay these proceedings. By this stipulation, the undersigned does not waive any rights to object to a legal determination of paternity on grounds of privacy, best interests of the child, substantive due process rights of the legal father or any other grounds.

Dated this 29 day of April, 1994.

Respectfully submitted

/s/ Amelia Cain DiPaolo
Amelia Cain DiPaolo

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
MAR 19 1996
CLERK

No. 95-1299

(2)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

IN THE MATTER OF THE PATERNITY
OF "ADAM," A Minor Child

"BOB,"
Petitioner,

and

"MARY" and "JOHN,"
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

---

RESPONDENT'S BRIEF IN OPPOSITION

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80 S. Warren, P.O. Box 1241
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(406) 442-8670
Counsel of Record for Respondents

Date: March 19, 1996

26 pp

QUESTIONS PRESENTED

1. In a paternity case brought by the putative biological father to establish his parental status and rights with respect to a child born into the marriage of its mother and another man, did the petitioner adequately raise the issue below where he did not argue in the court of first instance that federal Due Process or Equal Protection required a declaration of biological paternity regardless of the best interests of the child?

2. Is certiorari warranted where this court has already determined that Equal Protection and Due Process do not require a declaration of paternity in favor of the putative biological father of a child that is born into the marriage of its mother and another man, when the putative father has no established relationship with the child?

3. Is certiorari warranted when state courts of last resort have unanimously held, since Michael H., that federal Due Process and Equal Protection do not require a declaration of paternity in favor of the putative biological father of a child that is born into the marriage of its mother and another man, when the putative father has no established relationship with the child?

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JURISDICTION

Petitioner seeks to establish jurisdiction under 28 U.S.C. § 1257. Jurisdiction is not appropriate under § 1257 because the issue raised by petitioner was not raised in the court of first instance and the Montana Supreme Court therefore properly declined to address the federal constitutional issues. This fatal jurisdictional defect is discussed in greater detail below.

STATUTES INVOLVED

The adjudication of the Petition for Writ of Certiorari does not turn upon statutes, but upon the questions presented, set forth above. Nor does Petitioner challenge the constitutionality of any statute. Therefore, the various statutes appended by Petitioner are not involved in this certiorari proceeding. Other Montana statutes omitted by Petitioner also bore upon state issues, but are not involved in this certiorari proceeding and so are not appended hereto.

STATEMENT OF THE CASE

1. Essential facts.

The factual background essential to consideration of the petition is set forth by the Montana Supreme Court in its opinion below, *Matter of Paternity of "Adam,"* _____ Mont. _____, 903 P.2d 207, 208 (1995), (Appendix A to petitioner's brief), and is incorporated herein by reference. The Montana Supreme Court, upon motion of Respondents, assigned the pseudonyms "Adam," "Bob," "Mary" and "John" to the parties to protect their privacy. Those pseudonyms are used herein.

2. Relevant procedure.

Respondents hereby incorporate by reference the procedural history described by the Montana Supreme Court below. Respondents offer certain additional procedural background, as well, which may assist this court in the adjudication of the petition.

As noted by the Montana Supreme Court, the original petition to determine paternity was filed January 5, 1993, in the state district court in Gallatin County, Montana. On September 1, 1993, Petitioner Bob moved for summary judgment on the issue of paternity, based upon respondent's lack of a specific denial of paternity in their answer. On September 30, 1993, Respondents filed a cross motion to dismiss or to determine the best interests of Adam, a minor child.

Respondents' motion alleged that the petition should be dismissed on grounds that Bob had no standing to petition for a declaration of paternity of a child born into the marriage of its mother and another man. In the alternative, the motion argued that a paternity declaration in favor of petitioner would be against the child's best interest and therefore should not be made. Respondents filed a brief in support of their motion, which included an argument that federal Due Process specifically permits a state to prohibit an alleged biological father from challenging the paternity of a child born into the marriage of its mother and another man, citing *Michael H. v. Gerald D.*, 491 US 110 (1989).

A hearing on Bob's motion for summary judgment was set for October 22, 1993. At a status conference held on October 18, 1993, the parties stipulated that argument at the hearing on October 22, 1993, would be limited to the legal question of

whether in Montana a biological father has standing to petition the court for paternity of a child born during the marriage of the child's mother to another man.

On October 20, Bob submitted his "Combined Reply to Respondent's Brief Opposing Petitioner's Motion for Summary Judgment, and Response to Respondent's Cross Motion to Dismiss or to Determine the Best Interests of [Adam], a Minor Child." Bob did not directly raise the constitutional issues of Due Process and Equal Protection in this brief. Bob did cite two state court cases, decided prior to *Michael H.*, suggesting that federal Due Process and Equal Protection policies required that a putative biological father had a right to bring an action to rebut the presumption of legitimacy of a child born into marriage. *Starks v. Powell*, 552 So.2d 609 (LA App. 2d Cir. 1989) (putative biological father has a right under the Due Process clause of the Fourteenth Amendment to the U.S. Constitution to bring an action to rebut the presumption of paternity); *R. McG. v. J.W.*, 615 P.2d 666 (Colo. 1980) (Equal Protection under the U.S. Constitution mandated that the natural father be given the right to bring an action to rebut the presumption of legitimacy).

Bob also examined this court's plurality decision in *Michael H.*, contending that it "did not preclude the existence of a constitutional right in a natural father to a relationship with his child born into the marriage of the mother to another man."

Bob then argued that this court had recognized a "fundamental right of a natural parent to a relationship with his child when the parent comes forward to accept responsibility of the child, or in fact establishes a relationship with the child." Bob contended that the fundamental right was a liberty interest which could not be obstructed without due process of law, citing *Lehr v. Robertson*, 463 US 248 (1983); *Rivera v. Munich*, 483

US 574 (1987); *Hodgson v. Minnesota*, 497 US 417 (1990). Bob also stated generally that "a natural parent who comes forward to accept the responsibility for his child's future, is entitled to protection under the Equal Protection clause of the U.S. Constitution," citing *Lehr*. Bob then concluded:

> In sum, Bob does have constitutionally recognized rights to seek a paternity declaration in this matter, which may be balanced against the constitutionally protected interest in the integrity of the family raised by respondents. In this case, Petitioner's right to a relationship with [Adam] outweighs the interest of the Respondents in the presumption of legitimacy, because the marriage entered by Respondents is not a stable, enduring family unit.

On December 3, 1993, the state trial court denied Respondents' motion to dismiss and held that the Petitioner had standing to proceed with his petition to determine paternity. Because the trial court found authority for Bob's standing in the Montana Uniform Parentage Act, Mont. Code Ann. § 40-6-107, the trial court did not reach any constitutional question. The trial court concluded: "By this holding, the court does not imply that Petitioner is entitled to parental rights and responsibilities. The court will determine the best interests of the child in the context of this action at a subsequent hearing."

Bob's counsel withdrew by order of the state trial court on January 14, 1994. Bob's constitutional claims were never raised again in the court of first instance.

As noted by the Montana Supreme Court, blood tests were ordered and Respondents Mary and John stipulated that

Bob was the biological father of "Adam," without waiving Respondents' rights to challenge the declaration of paternity on best interest or constitutional grounds.

Trial was held on August 19, 1994, to determine, *inter alia*, whether a declaration that Bob is the biological father of "Adam" would be in the best interests of the child. At no time during that trial did Bob contend that the trial of this issue offended federal Due Process or Equal Protection guarantees. On September 8, 1994, Bob submitted his "Post Trial Proposed Findings of Fact and Conclusions of Law." At no point in these proposed findings of fact and conclusions of law did Bob contend that the consideration of the child's best interests offended his rights guaranteed by federal Due Process or Equal Protection provisions.

On October 11, 1994, the state trial court issued its "Findings of Fact, Conclusions of Law and Order." (See Appendix C to Petitioner's brief.) In its conclusions of law, the state trial court mentioned *Lehr* and *Michael H.* in passing. In regard to the latter, the court said: "In *Michael H. v. Gerald D.*, 491 US 110 (1989), the Supreme Court in a plurality decision determined that California's presumption of legitimacy statute did not infringe upon the Due Process rights of the putative father or of the child." Notwithstanding this remark, the state trial court did not decide whether federal Due Process was offended by denying a paternity declaration and parental rights to the putative biological father when it was contrary to the best interests of the child to declare paternity and recognize parental rights. The trial court did not mention the federal Equal Protection issue.

In his motion for reconsideration, Bob did not raise the federal Due Process or Equal Protection arguments.

The first time that Bob argued that federal Due Process and Equal Protection guarantees entitled him to a declaration and recognition of paternity, irrespective of the best interests of the child, was in Bob's opening brief to the Montana Supreme Court. Mary and John pointed out in their answer brief that this issue had not been raised and preserved in the court of first instance. The Montana Supreme Court agreed, explaining:

> Bob did not raise the constitutional issues of Equal Protection or Due Process below. We have held that issues not raised before the district court are generally not considered on appeal. *Miller v. Catholic Diocese of Great Falls*, 224 Mont. 113, 116, 728 P.2d 794, 795 (1986). We therefore decline to further consider Bob's constitutional issues.

The Montana Supreme Court's above-quoted ruling in *Paternity of Adam* is consistent with the state procedural rule that issues not raised below will not be heard for the first time on appeal. *Service funding, Inc. v. Craft*, 234 Mont. 431-434, 763 P.2d 1131, 1133 (1988); *Chamberlain v. Evans*, 108 Mont. 511, 517, 591 P.2d 237, 240 (1979).

3. Important findings of fact by the state courts.

Petitioner Bob relies upon language in *Lehr* and *Michael H.* suggesting that a biological father acquires a liberty interest in the relationship with his child when he has taken certain steps to develop and nurture that relationship. Because this court rarely disturbs state court findings of fact, it is important to examine the state courts' findings and conclusions regarding whether Bob took steps to develop and nurture his relationship with Adam.

The state trial court concluded:

C. [Mary] and [John] had been friends since 1987, and are now husband and wife. They indicate every intent to continue their marital relationship. They are financially stable.

D. [Adam] was born into the marriage of [Mary] and [John]. They are listed as his parents on his birth certificate. His surname on his birth certificate is [the same as Mary-John's].

E. [Adam] is now approximately 20 months old, has always lived with and been cared for by respondents, and has developed strong emotional bonds with respondents as his primary care givers. By all accounts, [Adam] is loved and well cared for in a safe and suitable home environment.

F. [Adam] and petitioner have had minimal contact with each other and are, in the words of petitioner, "total strangers." However, the lack of contact between the two is in no small measure due to the length of these proceedings. Petitioner promptly began paternity proceedings and should not be punished for complying with legal procedure.

G. The court is most concerned with petitioner's commitment to focusing on [Adam's] needs. Petitioner has not demonstrated personal responsibility in other areas of his life - business,

> financial or personal. While he verbally expresses a willingness to be cooperative with visitation and assume financial responsibilities to [Adam], he has taken no steps in this direction by finding steady employment, suitable housing, or establishing any child support fund. None of his testimony on the witness stand demonstrated an appreciation for, or understanding of, a child's needs for emotional stability and continuity, let alone the practical aspects of raising a toddler.

The Montana Supreme Court underscored the trial court's factual findings:

> . . . The court noted that Bob has had no contact with Adam and has demonstrated no personal commitment to or responsibility for Adam; nor has he taken steps to obtain suitable employment or housing or to establish a child support fund.
>
> . . . [The trial court] correctly applied the "best interest of the child test" by considering the stability of the family relationship of Mary and John contrasted with Bob's failure to show any commitment towards establishing a "parental" as opposed to a biological role.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The issue raised by the Petitioner was not raised below.

Respondents Mary and John moved for summary judgment in the court of first instance, arguing that a putative father does not have standing to petition to establish his paternity of a child born into the marriage of the child's mother to another man. Petitioner Bob opposed the motion, arguing that he had a constitutional right to petition to establish his paternity, based upon Due Process and Equal Protection guarantees. The trial court denied Mary and John's motion for summary judgment and found that the putative father, Bob, did have standing to petition to establish his paternity of the minor child in this case, Adam. The court denied Mary and John's motion to dismiss on the basis of statutory interpretation and did not resolve the constitutional issue. In the alternative, Mary and John moved the court to determine whether a declaration of paternity in Bob would be in the best interests of Adam. This motion was implicitly granted by the district court.

The state trial court ultimately decided to conduct a hearing to determine, *inter alia*, whether a declaration of paternity in Bob would be in Adam's best interest, and if it would not, whether paternity should be declared at all.

At no time did Bob argue in the court of first instance that federal Due Process and Equal Protection guarantees permitted him to establish his paternity of Adam, regardless of the best interest of the child. Yet that is exactly the issue which Bob attempts to raise now.

It is essential to the jurisdiction of the Supreme Court under § 1257 that the substantial federal question presented for review was raised in the state court proceeding. This principle was discussed by Justice Story in the Court's interpretation of §25 of the Judiciary Act of 1789, in *Crowell v. Randell*, 10 Pet. 368, 391, 398 (1836).

This court has recognized that a litigant must follow state procedures in raising the federal question. A failure to do so is grounds for denial of the petition for writ of certiorari. See *In Re Lamkin*, 355 U.S. 59 (1957); *Ferguson v. Georgia*, 365 U.S. 570, 572 (1961). This court has explained that "[a] state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized has a valid exercise of state power." *Williams v. Georgia*, 349 U.S. 375, 382-83 (1955). See also *Hulbert v. Chicago*, 202 U.S. 275 (1906) (complete failure to raise question at trial court level); *Brown v. Massachusetts*, 144 U.S. 573, 580 (1892) (failure to raise question before verdict held to be fatal); *Chicago, B & Q. R. Co. v. Chicago,* 166 U.S. 226, 231-32 (1897) (proper to raise question in motion for new trial); *Edelman v. California*, 344 U.S. 357 (1953) (failure to raise issue at trial); *Parker v. North Carolina*, 397 U.S. 790, 798 (1970).

In *Beck v. Washington*, 369 U.S. 541, 550 (1962), this court recognized the reasonableness of a state supreme court's refusal "to consider constitutional attacks upon statutes not made in the trial court even where the constitutional claims arise from the trial court's interpretation of the challenged statute." Where reasonable state procedural requirements are not observed by the petitioner, this court has declined to exercise jurisdiction where the highest state court expressly refused to decide the federal question for this procedural reason.

Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447, 462-63 (1936); *Erie R. Co. v. Purdy*, 185 U.S. 148 (1902).

The Montana Supreme Court, in its opinion in this case, determined that the Equal Protection and Due Process issues herein asserted by Petitioner Bob were not preserved in the state trial court. According to the Montana Supreme Court:

Petitioner Bob argues that the state supreme court erred in determining that his constitutional arguments were not preserved. Petitioner Bob cites a four-page excerpt from his brief filed in opposition to Respondent's motion for summary judgment in the state trial court. It is true that federal constitutional guarantees of Equal Protection and Due Process for unwed fathers were mentioned by Petitioner Bob's former lawyer in the brief opposing summary judgment. However, these constitutional arguments were raised only in opposition to Respondent's argument that Bob did not have standing to pursue this claim at all.

Significantly, Bob's federal constitutional arguments were never raised in opposition to the trial court's decision to receive evidence concerning and rule on the basis of the best interests of the child. The trial court was never given an opportunity to rule on the issue which Bob now asks this court to review. That is why the Montana Supreme Court refused to decide the issue. State procedural requirements for preserving the constitutional argument were not met by Petitioner Bob. Accordingly, jurisdiction is not appropriate under § 1257 and the Petition for Writ of Certiorari should be denied.

2. This court has already determined that Equal Protection and Due Process do not require a declaration of paternity in this situation.

This court's decision in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), is dispositive of the issue raised by Petitioner. In *Michael H.*, a man who claimed to be the biological father, sought to establish paternity. California law recognized a presumption that a child born into a marriage was presumed to be the biological child of the mother's husband, and stated that the presumption could be rebutted only by the husband or wife. The Petitioner challenged the constitutionality of this law and this court upheld the law, denying standing to the Petitioner who alleged himself to be the natural father. Justice Scalia's plurality opinion explained the vital public policy underlying the rebuttable presumption of legitimacy:

> The primary policy rationale underlying the common law's severe restrictions on rebuttal of the presumption appears to have been an aversion to declaring children illegitimate. . . thereby depriving them of rights of inheritance and succession, 2 J. Kent, *Commentaries on American Law* 175, and likely making them wards of the state. A secondary policy concern was the interest in promoting the "peace and tranquility of the states and families.". . . a goal that is obviously impaired by facilitating suits against husband and wife asserting their children are illegitimate. . . .
>
> We have found nothing in the older sources, nor in the older cases, addressing specifically the power of an actual father to assert parental rights over a child born into a woman's existing

> marriage with another man. Since it is Michael's burden to establish that such a power. . . is so deeply imbedded within our traditions as to be a fundamental right, the lack of evidence alone might defeat his case. But the evidence shows that even in modern times - when, as we have noted, the rigid protection of the marital family has in other respects been relaxed - the ability of a person in Michael's position to claim paternity has not been generally acknowledged. . . . *Michael H.*, 491 U.S. at 125-26.

Justice Scalia's opinion acknowledges that a biological father may have a unique opportunity to develop a relationship with his offspring, but holds: "Where . . . the child is born into an extant marital family, the naturally father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the state to give categorical preference to the latter." *Michael H.*, 491 U.S. at 129.

As in this case, the guardian *ad litem* in *Michael H.* supported the natural father's petition to establish his paternity. This did not persuade the court. Justice Scalia acknowledged the Due Process argument of the guardian *ad litem*, dismissing it as follows: "This assertion merits little discussion, for, whatever the merits of the guardian *ad litem's* belief that such an arrangement can be of great psychological benefit to a child, the claim that a state must recognize multiple fatherhood has no support in the history or traditions of this country." Id. at 130-31.

Petitioner Bob relies on this court's decisions in *Quilloin v Walcott*, 434 U.S. 246 (1978), *Caban v. Mohammed*, 441 U.S.

380 (1978), and *Lehr v. Robertson*, 463 U.S. 248 (1983). In *Michael H.*, this court distinguished those cases, among others, from this factual situation:

> Michael reads the landmark case of *Stanley v. Illinois*, 405 U.S. 645 (1972), and the subsequent cases of *Quilloin v. Walcott*, 434 U.S. 246 (1978), *Caban v. Mohammed*, 441 U.S. 380 (1979), and *Lehr v. Robertson*, 463 U.S. 248 (1983), as establishing that a liberty interest is created by biological fatherhood plus and established parental relationship - factors that exist in the present case as well. We think that distorts the rationale of those cases. As we view them, they rest not upon such isolated factors but upon the historic respect - indeed, sanctity would not be too strong a term - traditionally accorded to the relationships that develop within the unitary family. *Michael H.*, 491 U.S. at 123.

The controversy with respect to *Michael H.* arises with respect to the significance of Justice Stevens's concurring opinion. Justice Stevens concurred in the result of *Michael H.* but explained that he "would not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist in a case like this." *Michael H.*, 491 U.S. at 133. Importantly, however, Justice Stevens assumed "that Michael's relationship with Victoria is strong enough to give him a constitutional right to try to convince a judge that Victoria's best interest would be served by granting him visitation rights." Id. Justice Stevens concluded that California law gave him that opportunity.

Justices Scalia and Rehnquist concluded that Michael H.

had no liberty interest because there was no historical foundation for a constitutionally protected relationship between father and child in this setting. Justices O'Connor and Kennedy concurred that a liberty interest did not exist in this setting, without adopting Justice Scalia's broader statements regarding historical tradition. Justice Stevens allowed that a liberty interest may exist, but that it was satisfied by allowing the biological father to try to convince a trial judge that the child's best interest would be served by granting him visitation rights.

Accordingly, a majority of this court has already ruled that Petitioner Bob either has no liberty interest which warrants protection under the federal Due Process clause or that his liberty interest was sufficiently protected when he was given an opportunity to try to convince the state trial judge that awarding him visitation rights was in Adam's best interest. The Due Process issue raised by Petitioner Bob has already been decided. Certiorari, therefore, is not warranted.

Michael H. did not expressly address Equal Protection issues. Petitioner Bob asserts, without authority, that his status as "presumed father" rises to the level of a "suspect classification," triggering strict scrutiny analysis. "Presumed fathers" are not a suspect class. While Petitioner Bob's Equal Protection argument is not clearly framed, it appears that he takes the position that the father was treated differently than the mother. This court has already determined that gender-based distinctions are subject to middle tier analysis for Equal Protection purposes. *Caban*, 441 U.S. at 388. While the *Caban* court recognized a violation of Equal Protection under dissimilar facts, the court held: "In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection clause precludes the state from withholding from him the privilege of vetoing adoption of that

child." In *Caban*, the court emphasized that the biological father had "established a substantial relationship with the child." Id. at 393.

Likewise, in *Lehr*, this court observed: "[T]he existence or non-existence of a substantial relationship between parent and child is a relevant criteria in evaluating both the rights of the parent and the best interests of the child." *Lehr*, 463 U.S. at 266-67. The *Lehr* court concluded: "Because appellant, like the father in *Quilloin*, has never established a substantial relationship with his daughter. . . . The New York statutes at issue in this case did not operate to deny appellant Equal Protection." *Id.* at 267.

Lehr, *Quilloin* and *Caban* answered the question of whether Equal Protection prohibited recognizing more legal rights in the biological mother than in the biological father. All three cases suggest that the mother's rights may receive preferential treatment where the father has not established a substantial relationship with the child. Because Petitioner Bob has not established a substantial relationship with the child, he may not avail himself of Equal Protection arguments.

3. Petitioner's argument requires this court to make factual findings contrary to those reached in the state courts.

Petitioner Bob argues that his case is different from *Lehr* and *Quilloin* because he has taken steps to establish a substantial relationship with Adam. This assertion is contrary to the factual findings of the state courts. This court generally will not re-examine the state courts' findings of fact. *Grayson v. Harris*, 267 U.S. 352, 358 (1925); *Portland Ry. Co. v. Railroad Commission*, 229 U.S. 397, 412 (1913); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952).

The trial court concluded, after receiving all evidence:

> While he [Bob] verbally expresses a willingness to be cooperative with visitation and assume financial responsibilities for [Adam], he has taken no steps in this direction by establishing any child support fund. None of his testimony on the witness stand demonstrated an appreciation for, or understanding of, a child's needs for emotional stability and continuity, let alone the practical aspects of rearing a toddler. (Findings of Fact and Conclusions of Law ¶ 5(g), Petitioner's appendix, p. 26a).

Citing *Lehr*, the trial court impliedly concluded that Petitioner Bob failed to grasp the opportunity to develop a relationship with Adam and accept responsibility for Adam's future. (Findings of Fact and Conclusions of Law, ¶ 6, Petitioner's appendix p. 26a).

Similarly, the Montana Supreme Court explained that the district court "noted that Bob has had no contact with Adam and has demonstrated no personal commitment to or responsibility for Adam; nor has he taken steps to obtain suitable employment or housing or to establish a child support fund." *Matter of Paternity of Adam*, 903 P.2d at 211.

Petitioner's own authorities concerning Equal Protection require an established relationship between the putative father and the child. The state courts have already found the absence of an established relationship. Therefore, the arguments pressed by Petitioner Bob herein require this court to substitute itself for the state court as a fact finder. As noted above, this court will not do so under ordinary circumstances. For this reason, as

well, the Petition should be denied.

4. Other states have unanimously reached the same conclusion as the Montana Supreme Court.

This is not a case that involves a split of authority among the highest state courts. All of the state courts which have ruled on this issue since *Michael H.* have concluded either that the putative father does not have standing to bring this action or that paternity may be established in this setting only if it is in the best interest of the child to do so. See *Department of Health and Rehabilitation Services v. Privette*, 617 So.2d 305 (Fla. 1993) (error to order a paternity blood test without consideration of the child's best interest and the rights of the child's legal father); *McDaniels v. Carlson*, 108 Wash.2d 299, 738 P.2d 254 (1987) (best interest of the child should be considered before a paternity determination is made at all); *Dan v. Quigley*, 168 Ariz. 196, 812 P.2d 1014 (1990) (trial court required to make specific findings regarding the child's best interest before allowing the putative father to proceed with a paternity action); *Marriage of Ross*, 245 Kan. 591, 783 P.2d 331(1989) (district court must consider best interest of the child before ordering a blood test); *MF v. NH*, 252 N.J.Super. 420, 599 A.2d 1297 (1991) (trial court must determine whether declaration of paternity will serve the best interest of the child before blood tests may be ordered); *CC v. AB*, 406 Mass. 679, 550 N.E.2d 365 (1990) (putative father must show a substantial relationship with the child to gain standing and parental rights will then be awarded only when it is in the best interest of the child to do); *Ex Parte Presse*, 554 So.2d 406 (Ala.1989) (putative father denied standing to challenge paternity under the UPA.)

The fact that the highest courts of the various states which have confronted this issue uniformly have reached the

same conclusion as the Montana Supreme Court, is further reason for the Petition for Writ of Certiorari to be denied.

CONCLUSION

Petitioner failed to raise the federal constitutional arguments at the trial court below, thereby depriving this court of jurisdiction to address them. Further, this court has already addressed and rejected the argument raised by Petitioner. Moreover, even accepting Petitioner's interpretation of the authorities he relies upon, this court would be required to substitute itself for the state courts as a fact finder before Petitioner could raise a legitimate claim to parental rights. Finally, the highest courts of the various states are unanimous in their agreement with the Montana Supreme Court on this issue. For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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